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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	CASE NO. V1300CR201080049 Hon. Warren Darrow DIVISION PTB **DEFENDANT JAMES ARTHUR RAY'S REQUEST FOR CASE MANAGEMENT RULINGS; MOTION TO PRECLUDE INADMISSIBLE EVIDENCE**

Defendant James Arthur Ray, by and through undersigned counsel, hereby requests evidentiary rulings to facilitate case management and moves to preclude inadmissible evidence. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After two weeks of evidence, it is now clear that the State's case has diverged completely from well-established principles related to the charged crime of reckless manslaughter. The Defense continues to object, under the Due Process Clause, the Sixth Amendment, the First Amendment, and Arizona Revised Statue §13-201, to the unprecedented and impermissible theory on which the State now seeks to prosecute Mr. Ray. *See* Defendant's Motion to Exclude Audio Clips at 1 (filed Mar. 14, 2011). But *even* assuming arguendo that the State's theory of the crime were legally permissible—it is not—entire categories of the State's evidence have nothing to do with the charged crimes. These include:

- The 107 audio clips from the 5-day Spiritual Warrior seminar;
- Testimony regarding how participants other than the decedents felt and acted during the days prior to the sweat lodge;
- Testimony on various corporate risk management related issues, such as medical screening, staff training, or first aid equipment of JRI;
- Leading questions regarding Mr. Ray's conduct or beliefs that have no relation to the sweat lodge ceremony.

Addressing these categories of evidence in piecemeal and ad hoc fashion has proven unworkable. Mr. Ray's right to due process and a fair trial requires a concrete ruling from this Court. The Court should preclude these categories of evidence, should strike evidence in these categories that has been admitted over Mr. Ray's objection, and should provide a limiting instruction clarifying that no such evidence can be considered as proof of Mr. Ray's guilt.

II. ARGUMENT

A. The Purported Evidence of the Decedents' Mental States—the State's 107 Audio Clips, and Witness Testimony Regarding Participants' Feelings and Actions During the Five-Day Retreat—Is Irrelevant and Inadmissible.

The State has sought to admit and will continue to introduce 107 audio clips of Mr. Ray's statements in days leading up to the sweat lodge over the defense's objections. These are

attached as Exhibit A for the Court's review.[1] The State has also sought to elicit testimony from witnesses regarding their experiences and impressions at the five-day retreat. Such questions ask, for example, how a witness felt during the breathwork exercise and the Samurai game, what types of information a witness wrote in her journal, whether the witness complied with or enjoyed the "code of silence," etc. The State argues that both of these categories of evidence are relevant to prove the "victims' mental state," which the State asserts is relevant in light of its new theory that James Shore, Kirby Brown, and Liz Neuman died because Mr. Ray "conditioned" them to strive for certain goals. Even if this were a valid theory of the crime—which the Defense strenuously argues it is not—the theory does not support the evidence the State seeks to introduce.

This Court's January 3 ruling, now the law of the case, sets forth the limited circumstances "in which the state of mind of a victim is relevant to the question of whether or not a defendant possessed the culpable mental state of recklessness," and identifies the facts the State must prove to make the victims' mental states relevant here. *See* UA Ruling on MIL No.2, at 4 (Jan. 13, 2011). These requirements, which comprise at least 5 necessary showings, are independently compelled by logic and the Rules of Evidence. The State cannot satisfy these requirements. And the evidence the State does advance—audio clips and testimony regarding participants' feelings and actions during the days prior to the sweat lodge—is completely unmoored from the Court's ruling. To protect Mr. Ray's rights to due process and a fair trial, evidence in these two categories must be excluded.

1. The State must satisfy 5 requirements before introducing evidence related to the decedents' mental states.

The Defense repeats its objection that the prosecution in this case simply has not identified conduct that can be considered criminal under Arizona law. But in order for the decedents' mental states to be even potentially relevant to a reckless manslaughter crime, the State must, at a minimum, prove all three of the following:

- ***The decedents*** *had a mental state of wanting to stay in the sweat lodge despite extreme and dangerous physical hardship in order to comply with Mr. Ray's supposed*

[1] The constitutional bars to the audio clips are addressed in a separate motion filed this same date.

"rules." *See* UA Ruling on MIL No.2, at 5 (state must prove up its assertion that the decedents' mental state was "such that they would participate, despite extreme and dangerous physical hardship, out of a desire to get the full value of their investment"); *see also* State's Response to Motion to Exclude Audio Recordings of Spiritual Warrior Retreat, 2/25/11, at 8 (setting forth State's *new* and entirely different theory that decedents' mental state arose from Mr. Ray's "grooming" rather than cost of seminar).[2]

- *Mr. Ray was actually aware of this mental state of the decedents*. *See id.* at 5. ("Logically, in order to prove recklessness, the State must also prove that the Defendant was aware of this mental state in the alleged victims . . . .").

- *Mr. Ray knew that this mental state of the decedents would subject them to a substantial and unjustifiable risk of death*. *See id.* ("Logically, in order to prove recklessness, the State must also prove that the Defendant . . . was aware that this mental state would subject the alleged victims to a substantial and unjustifiable risk of death.").

Two additional requirements follow necessarily from the Court's January 13 ruling:

- *Evidence of activities or remarks in the days prior to the sweat lodge is inadmissible absent a showing that these actually affected the decedents' mental state inside the sweat lodge in the manner the State alleges*. The Court's reasoning regarding the inadmissibility of JRI's alleged refund policy applies fully here: "It would be speculation as to whether a no-refund policy, in itself, had an effect on a particular person. Any specific evidence relating to the alleged victims may eliminate this speculative aspect, and admission of such evidence may be consistent with the requirements of Rule 403." *Id.* at 3.[3]

- *The State must prove that the **decedents**—not other persons—had a State of mind that compelled them to stay in the sweat lodge*. There is absolutely no basis in law (or logic) for imputing the mental states of other participants to the decedents. And without evidence that the decedents had the mental state the prosecution alleges, there could not be a crime at all, even on the State's far-fetched theory. *See id.* at 4 (noting,

[2] The State initially attributed the decedents' supposed mental state to the cost of the seminar. *See* UA Ruling on MIL No.2, at 5 (describing State's position). The State now attributes the mental state to some sort of mind control or mental "conditioning." *See* State's Response to Motion to Exclude Audio Recordings of Spiritual Warrior Retreat, 2/25/11, at 8.

[3] This issue first arose during Ms. Polk's questioning of witness Melissa Phillips. The questions posed by Ms. Polk demonstrate what is *not* permissible. After the Defense objected, Ms. Polk represented at sidebar that the "Journey of Power" was relevant "to what the teachings are that [Ms. Phillips] believed and why she acted like she did." Draft Reporter's Transcript of 3/3/2011, at 51, at 15–17. The Court stated that the Journey of Power could potentially be relevant if it "ties directly into what her state of mind was at the time." *Id.* at 3–4. Ms. Polk then asked (in a leading fashion): "Q. Ms. Phillips, did the concepts of a journey of power affect your thinking while you were inside the sweat lodge tent?" *Id.* at 54:24–55:1. The answer—"A. I don't believe it did."—established that there was no foundation for this line of questioning. *Id.* at 55:2. The State's next question, "Q. Can you tell us what the journey of power is?" was impermissible and contrary to the Court's ruling just moments before. *Id.* at 55:3–4.

in discussing *State v. Jackson*, that "if the victim had not been in fear of the defendant, but rather had just chosen to drive in a fast and reckless manner with the defendant merely following her, the defendant's apparent conduct in following the victim, *even if such conduct was reckless as to other specific persons or the public in general*, would not be the legal cause of the victim's death" (emphasis added)).

2. The State Cannot Make the Required Showings

Two weeks into trial, the State has introduced *no* evidence to make any of the three required showings—[1] the decedents' mental states related to their choice to stay inside the sweat lodge, [2] Mr. Ray's knowledge of the decedents' mental states related to their choice to stay inside the sweat lodge, or [3] Mr. Ray's knowledge that the decedents' mental states related to their choice to stay inside the sweat lodge subjected them to a substantial and unjustifiable risk of death. Instead, the State seeks to insinuate the decedents' mental states, without appropriate foundation, by playing suggestive audio clips (taken wholly out of context) or by questioning witnesses regarding their individual reactions to remote incidents or remarks by participants or Mr. Ray. For three reasons, the Court should both exclude the audio clips and terminate this line of questioning.

First, the manner in which the State is attempting to prove the decedents' mental states is insufficient. There is no evidence that any of the audio clips or any activities on days prior to the sweat lodge actually affected the decedents in the way the State describes. Just as the Court ruled that evidence of JRI's purported refund policy had only speculative significance absent "specific evidence related to the alleged victims," UA Ruling on MIL No.2 at 3, evidence that, for example, Mr. Ray announced that yoga was mandatory, see audio clip #36, Sunday, 10/04/09, is irrelevant unless there is "specific evidence" that the pronouncement, "in itself, had an effect on a particular person," namely "the alleged victims." *Id.*

Second, the State's position regarding the decedents' state of mind rests on an erroneous factual premise. The State asserts that the decedents did not leave the sweat lodge because they were "conditioned" to follow Mr. Ray's purported "rules" or "instructions." *See, e.g.*, Transcript of March 1, 2011 at 8:15–16 (Ms. Polk's opening statement) (participants were "fully conditioned to follow Mr. Ray's instructions"). But the Court has now heard the instructions that were given

to participants before entering the sweat lodge. Rather than establishing a "rule" that participants must stay inside at all costs, the instructions informed participants that they could leave the sweat lodge if they felt they needed to do so, and set forth procedures for leaving safely. Moreover, the Court has now heard two weeks of testimony establishing that no one believed or felt they were conditioned to follow Mr. Ray's so-called "rules." Witness Melissa Phillips, for example, testified that she learned from the retreat to follow her *own* rules, such that she had no qualms about lifting the tent flap to get air during the ceremony. Similarly, witness Laura Tucker testified that none of the retreat activities affected her state of mind inside the sweat lodge, and that the media's characterization of Mr. Ray's seminars as involving "mind control"—the very theory the State now espouses—was an "absolute massive distortion" of reality. *See* Draft Transcript of Court Proceedings, Mar. 4, 2011, at 131:23–24. These undeniable facts dispose of the State's theory.

Third, as described in Part II.A.1 above, even if one accepts the State's unprecedented theory of the crime, evidence of the decedents' mental states is only conditionally relevant. It hinges on proof (not insinuation) that Mr. Ray knew of the mental state and that he knew that it exposed the decedents to a substantial and unjustifiable risk of death. But the State fails to offer evidence of either. Consequently, there is no permissible basis for allowing the State to introduce grossly prejudicial testimony in the hopes that the jury will infer from it some aspect of the individual decedents' purported individual mental states. The requirement that the State first establish the requisite evidentiary foundation and preconditions is particularly important given the serious prejudice that arises under Rule 403 from the type of evidence the State seeks to introduce—incomplete and misleading statements that, for example, convey Mr. Ray's discussions of death as a metaphor but are cut off right before he uses the word "symbolically," *see* audio clip #11, Thursday, 10/08/09.[4] There simply is no purpose to this evidence other than to improperly inflame prejudice, bias and emotion against Mr. Ray.

[4] Audio clip #11, Thursday, 10/08/09, interrupts Mr. Ray's statement mid-sentence. Mr. Ray states: "Because the greatest fear that you'll ever experience, is the fear of what? Death. You will have to get to a point, where you surrender and it's okay to die. And that's the extreme value of this ceremony, because, symbolically, you will go into. It's – a lodge is a rounded structure, they've started building it today. Some of you may have seen that happening, if your lodging is over in this direction. But they build sticks

B. Evidence Regarding JRI's Medical Screening, Medical Equipment, and Training of Staff is Irrelevant and Should be Precluded.

The State has asked every witness about the corporate practices of JRI. These questions include whether the participant signed a medical screening form[5] or was required to obtain a physical examination; whether the participant knew where JRI stored a first aid kit; whether the participant knew which JRI staff members or volunteers had medical training; whether the medical training of those staff members or volunteers was adequate; whether the participant knew if JRI had an emergency plan; and, in one case, whether the participant had received instruction regarding the disinfecting of hair clippers.

These questions are irrelevant, prejudicial, and confusing, and must be excluded pursuant to Rules 401, 402, and 403. As courts and commentators have long recognized, a defendant cannot be legally responsible, let alone *criminally* responsible, for what Justice Cardozo famously termed "negligence in the air." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 341 (1928) (Cardozo, C.J.) ("Proof of negligence in the air, so to speak, will not do."). Instead, for an act to be the basis for liability, the complaining party must show that without the allegedly negligent act the party "would have averted or avoided the injury." *Palsgraf*, 248 N.Y at 342. Furthermore, even where negligence by some party or entity is apparent, "it is still necessary to bring it home to the defendant." *Barbie v. Minko Const., Inc.*, 766 N.W.2d 458, 461 (N.D. 2009) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39, at 248 (5th ed.1984)).

The State cannot meet these basic requirements. There is no evidence at all that these corporate practices or their absence has *anything* to do with the cause of the three deaths. There is no argument, for example, that the decedents would have survived had they filled out a

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up in a rounded fashion, and there's one entrance, they throw tarps over the top of it. It's very low, you cannot stand up in it. Because heat rises and we don't want it to rise to far. And when you're going into a lodge, symbolically, you're going back into the womb. You're going into the womb of mother earth. And symbolically, what you're going to do is to die. To all that s***, and all the limitations and all the stories and all the things you've allowed to be your truth and have caused you to sell yourself short." Transcript of Spiritual Warrior Audio Recording, 10/08/09, at 55:3–17. Significantly, the State's offered audio clip cuts Mr. Ray off immediately after "that's the extreme value of this ceremony," and before "symbolically."

[5] The State overlooks the fact that each participant signed an Angel Valley waiver form certifying that they were in good health.

different medical screening form or been treated with a larger first aid kit. Nor is there any evidence that Mr. Ray himself was in charge of any of these corporate practices or had a duty to implement them. *See, e.g.*, *State v. Angelo*, 166 Ariz. 24 (App. 1990) (corporate officers could not be charged with offense of failing to file corporate tax returns because Arizona law does not impose duty on them to file and they did not have notice of possible criminal liability for failure to do so). And there certainly is no basis in law for arguing that the failure to require a medical form is the sort of "flagrant and extreme," "'outrageous, heinous, [and] grievous'" conduct that would constitute a gross deviation from the standard of care, or that the risk (if any) attendant to omitting such a form is so great that it is "'different in kind' from the merely unreasonable risk sufficient for civil negligence." *State v. Far West Water & Sewer*, 228 P.3d 909 (Ariz. App. 2010) (quoting *In re William G.*, 192 Ariz. 208, 212-13, 214–15 (App. 1997)).

Moreover, the prejudice of this line of irrelevant testimony is patent. The questions invite the jury to question whether JRI's corporate practices were appropriate, and to convict Mr. Ray for omissions that are not his own conduct, are not in any way connected to the deaths that he is charged with causing, and are not a legitimate basis for criminal (as opposed to civil) liability. *See generally* Defendant's MIL No.8 to Exclude Testimony of Steven Pace, at 5 (filed Jan. 24, 2011) (describing the prejudice).

C. Evidence Regarding Mr. Ray's Actions Unrelated to the Sweat Lodge Ceremony is Irrelevant and Prejudicial and Must be Excluded.

The State also asks each witness questions regarding Mr. Ray's actions that are designed for no purpose other than to cast Mr. Ray in a negative light. For example, the State asks each witness a string of questions related to whether he or she ever saw Mr. Ray rendering aid to injured participants or giving CPR. These questions are not probative of any material fact; they are leading questions that invite the jurors to view Mr. Ray as a callous person. *See generally* Transcript of 404(b) hearing, Nov. 10, at 22:22–23:9 (RT, Nov. 10, at 23 :3-1 0 (THE COURT: "But when you talk about something that happens after -- . . . when you talk about something about how someone reacts to the incident, you have kind of a causation question that comes up there. And the other aspect that hasn't really been dealt with is a 403 aspect. It almost appears

you're talking about some trait of callousness or something might -- that would clearly not be admissible. And argument to that effect would not be admissible. Evidence to that effect would not be admissible."). They are also purposefully misleading. The fact that one witness did not observe something does not mean it did not happen. Some of the State's own witnesses will say that they asked for and received from Mr. Ray what assistance he could render. The State also asks witnesses repeatedly and over defendant's objection about the "Journey of Power" and the "World Wealth Society." These questions, too, are irrelevant and prejudicial; they are geared toward associating Mr. Ray with beliefs that jurors may not share, or depicting him as an unlikable businessperson. The Court should bar these lines of testimony pursuant to Rules 401, 402, and 403.

III. CONCLUSION

The Court must require the State to focus its case on evidence that proves the elements of reckless manslaughter. The bulk of the evidence introduced to date has no such relevance. To provide for a fair and orderly trial confined to the law, not character evidence or unfounded speculation, this Court should preclude the irrelevant and prejudicial evidence; should strike the irrelevant evidence that has been admitted over Mr. Ray's objections; and should provide a limiting instruction informing jurors that evidence in the aforementioned categories cannot be treated as evidence of Mr. Ray's guilt.

DATED: March 14, 2011

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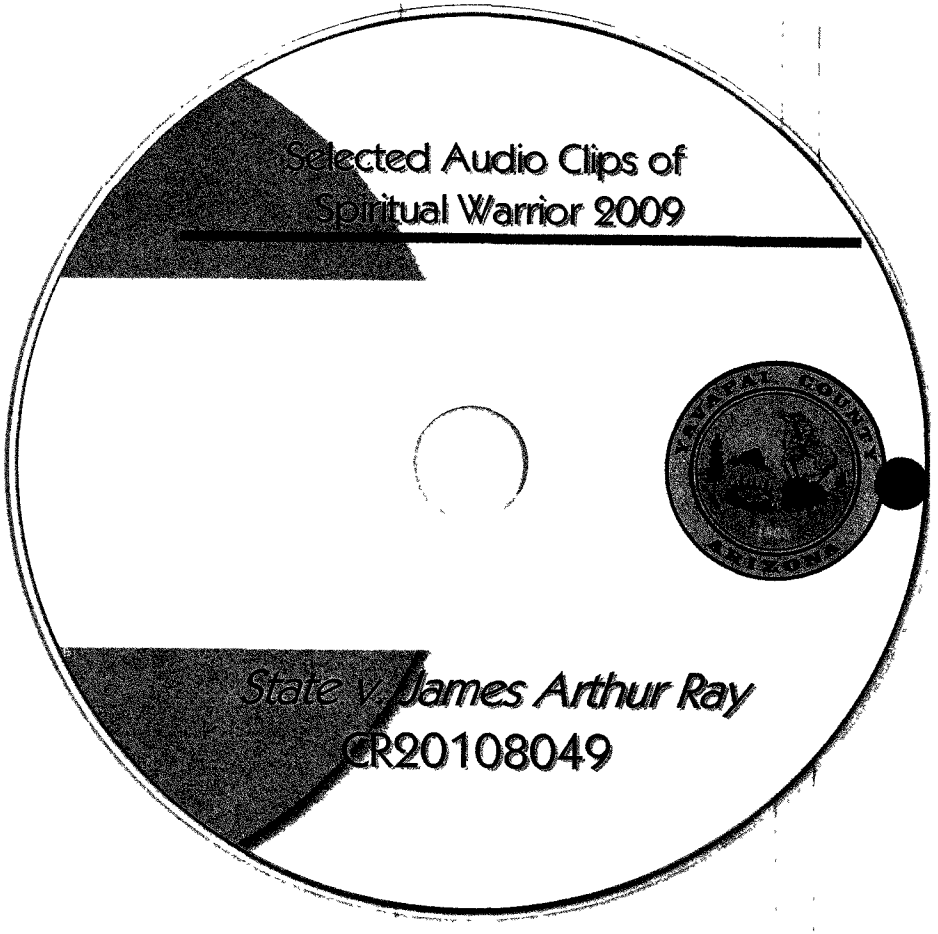
Selected Audio Clips of
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